PUBLIC PROSECUTOR

v.

LOW AIK BOON [2]

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[FT CRIMINAL TRIAL NO. 12 OF 1983]
23 DECEMBER 1987

CRIMINAL PROCEDURE: *Trafficking - Ambush - Car stopped - Allegation that drugs found in underwear of accused - Denial - Accused story that drugs found in car - Car not belonging to accused - No signatures of police inspection on underwear - Custody and control - Presumptuous under s. 37(d) of the Dangerous Drug Act - Search list - Whether incomplete accused's allegation that contents of search list not explained to him.*

CRIMINAL PROCEDURE: *Failure of prosecution to cross - examine accused on material facts - Effect of - Form Police 56.*

On 21 April 1983, the police laid an ambush for a car bearing registration no. WAP 1260. While conducting a body search a package was recovered from the underwear of the accused which was suspected to contain heroin. Later on the Police Station, certain exhibits were examined and a search list was prepared and subsequently acknowledged by the accused.

It was the defence's contention that the drugs were found on the person of the accused but was found in the car. The accused while giving evidence on oath further reiterated that the contents of the search list were not explained to him.

The learned Counsel for the defence further submitted that the prosecution failed to cross-examine the accused on material particulars, namely:

(i) that the package was removed from the car.

(ii) that the search list was half completed when the accused was asked to sign it.

(iii) that the underwear was handed to the accused by his wife in the lower Court on 30 April 1983.

According to the learned Counsel for the defence, the prosecution having failed to cross-examine the accused on vital points were deemed to have accepted the evidence of the accused on these points.

Held:

[1] The prosecution, having failed to cross-examine the accused on vital points, were deemed to have accepted the evidence of the accused on those points, and on a balance of probabilities, the defence had rebutted the prosecution's case.

[2] A vehicle in which a drug is being carried does not ipso facto fall within the words 'anything whatsoever containing any dangerous drugs and therefore the presumption contained in s. 37(d) of the Dangerous Drugs Act does not arise.

[3] The police's evidence as regards the underwear is inconsistent with Police 56, a form which is a record of the items taken away from the accused before he is put in the lock-up. The relevant Police 56 did not show the underwear as an item taken away from the accused.

[4] There is not direct evidence to prove that the accused was in possession of the drugs.

[Accused acquitted and discharged.]

Cases referred to:
Wong Swee Chin v. Public Prosecutor [1981] 1 MLJ 212
Bal Kishan v. State & Anor. [1977] Cr LJ 410
Tong Peng Hong v. Public Prosecutor [1955] 21 MLJ 232
Public Prosecutor v. Yuvaraj [1969] 2 MLJ 89
R v Carrbriant [1943] 1 KB 611

Legislation referred to:
Criminal Procedure Code, s. 425
Dangerous Drugs Act 1952, ss. 37(d), 39B(1)(a)

JUDGMENT

Zakaria Yatim J:

The charge against the accused is that on 2 April 1983 at about 8.30 pm. near the premises at No.25, Lingkungan Mata Air, Off Jalan Genting Klang, Kuala Lumpure he did traffic in dangerour drugs, to wit 46.59 grammes of heroin and that he thereby comitted an offence under s. 39B(1)(a) of the Dangerous Drugs Act, 1952 (Revised 1980) and punishable under s. 39B(2) of the same Act.

The prosecution case is that on 21 April 1983 at about 8.20 pm, Inspector Megat Aminud din together with Inspector with Kong, D/Cpl. Tan Kim Huat Lingkungan Mata Air, Off Jalan Genting Klang, in Kuala Lumpur. There they stopped a car, registration No. WAP 1260. When the car stopped, Indspector Megat proceeded to the ened the door of the car. He instructed the driver of the car, who is the accsed in this case, to come out of the car. When the wrapped in a chinese newspaper. The package was recovered from the underwear of the accused. It contained one plastic packet which was suspected to contain heroin. The accused was then handcuffed by D/Cpl Tan Kim Huat. The accused was taken to the Anti-Narcotic branch at Jalan Bandar Police Station. There the exhibits were handed to Inspector Hassan Malik, who was the Investigation Officer in this case. Inspector Hassan subsequently sent the Chinese newspaper wrapper and the plastic packet containing the suspected heroin to the Chemistry report, the plastic packet contained 113.69 grammes nett of a light brown granular substance. On analysis the Chemist found the granular substance to contain 46.59 grammes of heroin.

In his cross-examination, learned counsel for the defence suggested that the drug was not found in the accused's underwear but was found in the car. This was denied by Inspector Megat. D/Cpl. Tan Kim Huat reiterated the prosecution's story that the underwear was worn by the accused on the day of the arrest. Curiously enough, unlike the other exhibits recovered, neither Inspector Megat nor Inspector Hassan put their signatures and the relevant date on the underwear.

At the end of the case for the prosecution I found that a prima-Facie case was made out against the accused. From the evidence of Inspector Megat and D/Cpl. Tan Kim Huat, I was satisfied that the heroin was found on the person of the accused, that is, in his underwear. It is clear from the evidence that the heroin was found in the custody of the accused and it was also under his control. The prosecution therefore succeeded in raising the presumption under s. 37(d) of the Dangerous Drugs Act, 1952.

The accused elected to give evidence on oath. According to the accused, on 21 April 1983 before he was arrested, he was in his workshop. That evening at about 7.30 pm. his brother drove the car WAP 1260 to his workshop and told him to pick a person by the name of Ah Wah. His brother left the car at the workshop. The accused did not go immediately but

only left the workshop after he finished his work at about 8.10 pm. The accused confirmed that he was arrested by the police at Lingkungan Mata Air. He denied that the heroin was found in his underwear. He said his body was searched by Inspector Megat but nothing was found on him. According to him, Inspector Megat then searched the car and found the package. When he was put in the lockup, he was wearing his underwear. He said the underwear produced in Court (P4) was the underwear brought to him by his wife on the day he was charged in the lower court. He claimed that Inspector Hassan took away that underwear. He denied that he was wearing that underway on the night of the incident. He further said in his evidence that when he was asked to sign the search list, the particulars under item 4 were not filled up. He also denied that the content of the search list was explained to him.

After the accused had given his evidence, the learned Deputy made an application under s. 425 of the Criminal Procedure Code requesting the Court to call Low Aik Seng to give evidence in Court. Subsequently, in the course of the defendant's case, the learned Deputy made another application under the same section requesting the Court to call three newspaper reporters from three separate newspapers. Learned Counsel for the defence objected to the application under s. 425 of the Criminal Procedure Code. I dismissed the application and gave my reasons in a separate written ruling.

The defence tendered a copy of Tong Bao newspaper dated 23 April 1983. A photocopy of a report contained in that newespaper together with an English translation were produced in Court as exhibits. The newspaper report states, *inter alia*, that ACP Yahya said at a Press Conference as follows:

> He said that Inspector Megat together with three other personnel from the anti-narcotic branch had laid an ambush at Lingkungan Mata Air at about 8.20 p.m. last night acting on information received. He further said tha a white Daihatsu car was seen coming from the opposite direction and the said car was stopped by the police.
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> ACP Yahya said a man aged about 29 years old was seated in the car. Initially, the police pulled the man out of the car and conducted a thorough body search on him but found nothing. Subsequently, the said drugs was discovered in the car. The heroin concerned was packed in a plastic bag and wrapped with a piece of chinese newspaper.

Learned Counsel for the defence submitted that the prosecution failed to cross-examine the accused on material particulars namely:

(i) that the package was removed from car.

(ii) that the search list (P5) was half completed when the accused was asked to sign it.

(iii) that the underwear was handed to the accused by his wife in the lower court on 30 April 1983.

According to learned Counsel for the defence, the prosecution, having failed to cross-examine the accused on these vital points, were deemed to have accepted the evidence of the accused on these points.

I entirely agree with the learned Counsel. As a general rule, the failure to cross-examine a witness on a crucial part of the evidence would amount to an acceptance of the witness's testimony. *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212 at p. 213. See also *Bal Kishan v. State & Anor*. [1977] Cr. LJ 410.

In his evidence, the accused said:

> My car was stopped by the police. An inspector opened my door. He called me out. I followed what he said. He searched my body. He did not find anything. He went into the car and conducted a search. I saw him holding a thing in his hand and came out from the car. I didn't get a chance to look at what the thing was. He didn't show me. I had no time to observe clearly - I could only see a package.

The learned Deputy's cross-examination on this point was as follows:

> Q: You said this man who opened the car door searched your body didn't find anything. he then searched your car and you saw him holding something in his hand.
>
> A: Yes.
>
> Q: Would you agree with me that you don't really know from where the packets recovered except from the car.
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> A: I agree.

It will be noted that the last question asked by the learned Deputy as quoted above is more favourable to the defence.

With regard to the search list, the accused in his evidence stated in the following words:

> When I signed P5 particulars under item 4 not written. Particulars under item 4 and below were not filled up when I signed it. This document was not explained to me. I don't know why I signed.

I her cross-examination, the learned Deputy merely asked whether the accused knew basic Malay and the accused replied that he knew a little bit of simple Malay.

With regard to the underwear the accused said:

> I recognise this underwear, P4. An underwear was brought to me by my wife on day I was charged in lower Court. My wife sent to me and before I was put back to lower Court PW4 (Inspector Hassan) took it from me.

The learned Deputy did not question the accused on this point except to ask the accused the date of his wife's visit.

In view of the evidence I have just referred to and in view of the authorities cited above, I am of the opinion that the prosecution are deemed to have accepted the evidence of the accused with regard to the three crucial points.

If the prosecution are deemed to have accepted the accused's evidence that the heroin was found in the car then on the balance of probability the defence has rebutted the prosecution case. A vehicle in which a drug is being carried does not *ipso facto* fall within the words "anything whatsoever containing any dangerous drug" and therefore in such a case the presumption contained in s. 37(d) of the Dangerous Drugs Ordinance does not arise. *Tong Peng Hong v. Public Prosecutor* [1955] 21 MLJ 232.

With regard to the underwear, the prosecution are deemed to have accepted that the underwear (P4) was handed to him on 30 April 1983. The accused's story about the underwear is a plausible story. The prsecution's witnesses maintained that the underwear was the same underwear worn by the accused on the day of his arrest. But their evidence is inconsistent with Police 56. This form is filled in for the purpose of keeping record of what is the item taken away from the accused before he was put in the lockup. The relevant Police 56 does

not show underwear as an item taken from the accused. If Inspector Megat and D/Cpl. Tan Kim Huat saw him wearing underwear at the time he was arrested, then Police 56 (D14) would show that the accused was wearing the underwear on 22 April 1983. If he was wearing his underwear, from Police 56 it is clear that the underwear exhibited in Court (P4) is not the underwear worn by the accused on the day of his arrest. If it is true that the drug was found in his underwear any average investigating officer would take the underwear as exhibit. Instead, the prosecution chose to produce a different underwear in Court.

From what I have stated above, I have no doubt that, on the balance of probability, the defence has rebutted the presumption under s. 37(d) of the Dangerous Drugs Act, 1952. The onus on the defence is to prove its case on the balance of probability. The test is the same as that applied in civil proceedings. *Public Prosecutor v. Yuvaraj* [1969] 2 MLJ 89. In *R v. Carrbriant* [1943] 1 KB 611, the English Court of appeal said:

> What is the burden resting n a plaintiff or defendant in civil proceedings can, we think, best the stated in the words of the classic pronouncement on the subject by Willes J in *Cooper v. Slade* [1943] 1 KB 611. They learned Judge referred to an ancient authority in support of what he termed "the elementary" proposition that in civil cases the preponderance of probability "may constitute sufficient ground for a verdict." The authority in question was the judgment of Dyer CJ and a majority of the justices of the Common Pleas in *Newis v. Lark* (*supra*), decided in the reign of queen Elizabeth. The report contains this passage (2): "Where the matter is so far "gone that the parties are at issue ... so that the jury is "to give a verdict one way or other, there if the matter is `doubtful, they may found their verdict upon that which "appears the most probable and by the same reason that which "is most probable shall be good evidence.
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> In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person "unless the contrary is poved," the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

I have considered the evidence as a whole and I find no direct evidence to prove that the accused was in possession of the dangerous drugs.

In the circumstances, I find the accused not guilty of the charge and he is acquitted and discharged.

Also found at [1990] 1 CLJ 977